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IN THE

Supreme Court of the United States

October Term, 1959

No. 1010

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

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We deal with the issues in the same order as they are presented in the government's opposition.

1. The Question of Venue (Opp., pp. 8-11)

The government acknowledges that the decision of the court below that venue was properly laid in the District of Colorado is in conflict with the decision of the Third Circuit in *United States* v. *Valenti*, 207 F. 2d 242, also a Section 9(h) case, in which it was held that venue is proper only at the place where the affidavit is received by the Labor Board. However, the opposition contends (pp. 10-11) that the reasoning of *Valenti* will not apply to the reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (Pet., p. 44, n. 35). The argument is that the conclusion in *Valenti* was based on the fact that filing under Taft-Hartley was voluntary while the reporting provisions of the new Act (Title II) are mandatory. The opposition concludes that even on the reasoning in *Valenti*, under the 1959 statute, there is

"a breach of statutory duty as soon as the reporting party engages in the initial act of making a false report" (p. 11).

There is nothing in *Valenti*, or in any other case, that supports the conclusion that where reporting or filing is mandatory, the crime of filing a false report is committed when the false report is made. Even under the continuing offense statute, 18 U. S. C. 3237, on which the government relies in this case, it has never been held that the crime of filing a false report or statement is committed when the false report or statement is made. The report or statement must be filed with the agency of the government before there is a crime in any district.

In any event, the government's position is contradicted by the tax fraud cases which we cite in the petition (p. 41): *Bowles* v. *United States*, 73 F. 2d 772 (C. C. A. 4), cert. denied, 294 U. S. 710; *Wampler* v. *Snyder*, 66 F. 2d 195 (C. A. D. C.). Cf. *United States* v. *Lombardo*, 241 U. S. 73; *Johnston, et al.* v. *United States*, 351 U. S. 215.

2. The Insufficiency of the Evidence (Opp., pp. 11-14)

(a) The opposition (p. 11) asserts that "the decisions uniformly hold" that the perjury rule of evidence is inapplicable to prosecutions under the "false statement" statute.

It is true that, aside from the court below,[1] three other Courts of Appeal have held that the perjury rule does not apply in prosecutions such as these. But all three cases were reversed on other grounds. *United States* v. *Killian*, 246 F. 2d 77, 246 F. 2d 82 (C. A. 7); *Gold* v. *United*

[1] Among the cases cited in the opposition is *Sells* v *United States*, 262 F. 2d 815, cert. denied, 360 U. S. 913, a decision in the court below which it followed in the opinion affirming petitioner's conviction. The denial of certiorari in the *Sells* case is not very meaningful because, as the government pointed out in its opposition to the petition in that case (p. 13), Sells had not raised the issue at the trial.

States, 237 F. 2d 764 (C. A. D. C.), 352 U. S. 985; *Fisher* v. *United States*, 231 F. 2d 99 (C. A. 9). Furthermore, as we said in the petition (p. 14), the opinion in the *Fisher* case calls the question "a close one", 231 F. 2d at 106, and Judge Murrah in this case and Judge Bazelon in the *Gold* case were of the opinion that the perjury rule does apply.

By its grant of certiorari on the issue in *Gold*, 352 U. S. 819, this Court indicated in 1956 that the question should be resolved. Since that time, the issue has continued to be mooted in the lower courts.[2] It still merits resolution by this Court.

(b) The government argues (pp. 12-13) that the rule that extra-judicial admissions of the accused made after the alleged commission of the offense require corroboration applies only to admissions made to law-enforcement authorities and not to admissions made to private individuals, as in this case. That this may be the rule is suggested by *Smith* v. *United States*, 348 U. S. 147, but the opinion in *Opper* v. *United States*, 348 U. S. 84, indicates no such limitation. See *Bryson* v. *United States*, 238 F. 2d 657, 662 (C. A. 9). In any event, there is apparently no lower court decision explicitly supporting the government's contention, while there are decisions applying the corroboration rule

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[2] Insofar as we are aware, the matter has been raised in three other recent cases. Killian's second conviction was recently affirmed, *United States* v. *Killian*, 275 F. 2d 561 (C. A. 7). Although the opinion makes no reference to the issue, it was presented in appellant's brief. We are informed that a petition for rehearing has been denied by the Court of Appeals and that a petition for writ of certiorari will be filed on or before June 12. Similarly, the issue was presented in appellant's brief in *United States* v. *West, et al.*, 274 F. 2d 885 (C. A. 6), but was not referred to in the opinion. We are also informed that a petition for rehearing has been denied and that a petition for writ of certiorari will be filed on or before May 20. The issue was also raised on the trial in *Pezzati et al.* v. *United States*, pending in the Court of Appeals for the Tenth Circuit, No. , on an appeal from a conviction, like that in the *West* case, for conspiracy to file false non-Communist affidavits under Taft-Hartley.

to cases of admissions to private persons. *United States* v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2), cert. denied, 355 U. S. 883; *United States* v. *Nystrom & Kennedy*, 237 F. 2d 218, 225 (C. A. 3).

In this case, Mason and Gardner testified, on the trial in January, 1958, as to alleged post-affidavit admissions made by petitioner in conversations with one or the other of them during a period from March, 1952, to August, 1953 (Pet., pp. 7-8, 14-15). Testimony of oral admissions is suspect in any event, *Sandez* v. *United States*, 239 F. 2d 239, 250 (C. A. 9), but here, in addition, the testimony related to times in the fairly remote past. Furthermore, the alleged admissions were circumstantial, not direct. This, then, is a case to which the corroboration rule would seem to be peculiarly applicable.

(c) In fact, the fundamental weakness in the proof in this case is that it consists *entirely* of petitioner's admissions. *There is not a shred of evidence of the corpus delicti.* It is not merely that there is no evidence to corroborate petitioner's admissions that it was he who committed a crime. There is no evidence that a crime was even committed. And a conviction can not be had on a confession or an admission in the absence of any evidence that there was a crime in the first place.[3]

This gaping hole in the proof may explain why the opposition finds it necessary to assert that "petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member" (p. 13). As the record citations in support of this assertion indicate, it is based on the testimony of Eckert, the only witness aside from Mason and Gardner. But Eckert's testimony

[3] "The proof of every crime consists of: (1) proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime." 2 Wharton, *Criminal Evidence* (12th ed. 1955), Sec. 393, pp. 130-131. Cf. *Kelly* v. *United States*, 246 F. 2d 864 (C. A. 10).

related to the period from 1942 to 1948, during which time petitioner was—as he conceded and offered to stipulate on the trial—a member of the Party (Pet., p. 5). It is impossible to comprehend how evidence that petitioner was a Party member from 1942 to 1948 corroborates admissions he is alleged to have made after the affidavits were filed in 1951 and 1952.

In his dissent in the court below, Judge Murrah observed that the evidence was "inconclusive" (Pet. App. A, p. 76). The fact is that, without evidence of the corpus delicti, the evidence is palpably insufficient.

3. The "Can't Resign" Testimony (Opp., pp. 14-15)

(a) The petition argues (pp. 33-35) that Eckert's testimony that during his membership in the Communist Party (which terminated in 1948), the policy of the Party was "that once having joined (it) you could not leave without being expelled", was improperly admitted. In rejecting this argument, the Court of Appeals said that the evidence "was probative of the second side of the question of membership, i.e., whether the Party was willing to accept the defendant and recognize him as a member. * * *" (Pet. App. A, p. 58).

The opposition argues that since "acceptance of membership by the organization is an 'essential element of membership in an organized group' (*Jencks* v. *United States*, 353 U. S. 657, 679 (concurring opinion of Mr. Justice Burton)), the evidence was properly admitted" on the ground given by the Court of Appeals (pp. 14-15). "The jury, whether or not it believed Eckert, was, of course, free to find, if it chose", the opposition says, "that petitioner, from his side, had severed the connection with the Party" (p. 15).

In the first place, what Mr. Justice Burton called "the essential element of membership in an organized group" included "the desire of an individual to belong to an or-

ganization" as well as "a recognition by the organization that it considers him as a member." 353 U. S. 657, 679. It is therefore difficult to understand what the government means when it says that the jury, whether or not it believed Eckert, was free to find that petitioner, "from his side," had severed his connection with the Party.

Apart, however, from this apparent *non sequitur*, the jury was not properly instructed on this matter and therefore, if it believed Eckert, must have taken his testimony to be probative of both sides of the question of membership. Thus, the trial court refused to charge that petitioner could not be convicted unless the jury found that he believed himself to be a member of the Party when he executed the affidavits (Supp. R. 8) or that Eckert's testimony about the "can't resign" policy should not be considered unless the other evidence showed it to have been the policy in August, 1949, when petitioner resigned, that petitioner knew of it, and that he had accepted, approved, or adopted it (Supp. R. 2). By the refusal of these requests, the jury was left free to find that Eckert's "can't resign" testimony was, without more, probative of petitioner's desire to belong to the Party as well as of the Party's acceptance of him.

b) The opposition relies also on the recital in the opinion of the court below (Pet. App. A, pp. 58-60) of evidence "from which the jury could reasonably have inferred that petitioner had knowledge of the Party's policy against resignations" (p. 15, n. 8).

In the first place, even if there were such evidence, the refusal of the trial court to give the requested instructions permitted the jury to find that petitioner desired to belong to the Party solely on the basis of Eckert's "can't resign" testimony.

In the second place, the evidence of the four episodes which the court below reviewed in this connection (Pet.

App. A, pp. 58-60) does not justify the inference that petitioner had knowledge of the "can't resign" policy. At the meeting in New York in 1948, it was decided that Communists in the trade unions would not file the non-Communist affidavits. The question of resignation from the Party was therefore irrelevant and was not discussed. In the June, 1949 conversation with Mason, all that petitioner said was that consideration was being given to signing the affidavits. In the July, 1949 conversation, petitioner showed Mason a copy of his resignation statement and said that the Party had approved it. Thus, this is evidence that, at least in this instance, the Party approved a policy of resignation rather than the opposite. Finally, Gardner's testimony about his conversation with petitioner in October, 1951, though somewhat ambiguous, shows petitioner to be complaining that "the enemies of the Party" were attacking his resignation as not being bona fide.

c) The court below acknowledged that the Eckert testimony "could show nothing of the state of mind of the defendant" (Pet. App. A, p. 58). However, said the court, "the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior" (*ib.*, p. 60).

The difficulty with this conclusion is that the jury was not so instructed. By the refusal of the trial court to give the instructions requested by petitioner, the jury was left free to infer that Eckert's testimony was alone sufficient to show "the state of mind of the defendant." Furthermore, it is reasoning in a circle to say that although the Eckert testimony "could show nothing of the state of mind of the defendant", the testimony "was relevant in the interpretation of the defendant's statements and behavior". Even if the other evidence did show that petitioner knew of such a policy, the Eckert testimony was inadmissible on that issue. In any case, the refusal of the trial court to instruct the jury as requested allowed the jury to infer knowledge only from the Eckert testimony.

4. The Application of Section 3500 (Opp., pp. 17-19).

The government argues (pp. 17-19) that petitioner was not prejudiced because of the erroneous position of the prosecutor on the trial that government attorneys and Congressional investigators are not "agent(s) of the Government" within the meaning of Section 3500 and that therefore "statements", as defined in subsection (e), to such persons are not producible to the defense.

"In the first place", says the opposition, "the United States Attorney also advised the court that the United States possessed no statements made to attorneys (R. 202), and that the Executive Branch had no statements (if any existed) which might have been made to Congressional personnel (R. 201)" (pp. 17-18).

These references to the record are incomplete and misleading. With respect to statements made to attorneys, it is true that at the point cited by the government, the United States Attorney remarked that "there is no such report" and that "there isn't any such statement" (R. 202). But these remarks were addressed to the contention which had just been made by defense counsel that if there were "statements" made to the United States Attorney or his own staff, they were producible. Even in this connection, it appears that the United States Attorney was defining "statement" to exclude what he called "work product", as the colloquy at this point in the record makes clear (R. 200-211). In any event, during the course of this same colloquy, the United States Attorney made it quite explicit that, in view of his position that Section 3500 does not apply to statements to attorneys, he had made no effort to determine whether there were "statements" made to government attorneys elsewhere than in his office. Thus, he stated that "I wouldn't know what other U. S. Attorneys might have, Mr. Deikman" (R. 204); that he "would have no knowledge" whether there were statements in El Paso and "other places" where the witness, Eckert, had

testified (R. 205); and that he had made no effort to determine what was available as a result of interviews with the witness by government attorneys elsewhere (R. 208-209).

Eckert and the other two witnesses had had a great number of interviews over the years about the subject matter of their direct testimony in this case with government attorneys in Washington, El Paso, Denver and other places, in connection with their appearances in administrative proceedings, trials, and before grand juries (R. 383-98, 453-71, 508-20, 811-12, 833-44, 956-66, 983-85). If, as a result of these interviews, there were any "statements" in the possession of the government, they were not produced because the prosecution, as a consequence of its view that government attorneys are not "agent(s)" of the government, had made no effort to find out whether they existed.

With respect to statements to Congressional personnel, the record is even less free of doubt. It is true, as the opposition says (pp. 18-19), that the United States Attorney advised the court that "the Executive Branch had no statements (if any existed) which might have been made to Congressional personnel (R. 201)". But this reference to the record neglects to say that the United States Attorney had no such statements because, as in the case of attorneys, he took the position that "those are not encompassed within the purview of 3500 * * *" (R. 201). He reiterated this position at other points in the record when the defense was eliciting testimony from Eckert that he had been interviewed by an agent of a Senate subcommittee and requested that any "statements" in that connection relating to the subject matter be produced (R. 315, 523-24). The United States Attorney had no such statements because he had made no effort to discover whether any existed.

In any event, argues the government, the defense was not prejudiced because the trial judge permitted defense counsel, outside the presence of the jury, to question the witnesses to determine "whether there might be pre-trial

statements other than the F.B.I. statements which had been produced" (p. 18). Such interrogation, says the government (pp. 18-19), failed to disclose that there were any such statements, and besides, the defense could have pursued the matter by calling the persons who had interviewed the witnesses.

But this argument, by its very nature, assumes that in the case of government attorneys and Congressional personnel, the procedure under Section 3500 is different than in the case of F.B.I. agents. In the case of the latter, the government is required to produce any "statements" in its possession. But in the case of attorneys and Congressional investigators, according to the government, it becomes the responsibility of the defense to prove that there are "statements" in existence.

If attorneys and Congressional personnel are "agents" —as the government now apparently concedes—then the procedure under Section 3500 with respect to production of "statements" made to them is of course the same as in the case of "statements" made to F.B.I. agents. On the trial, the defense was whipsawed between the contention of the prosecution that attorneys and Congressional investigators are not "agents", on the one hand, and the insistence of the trial judge that the defense first prove that there were in existence "statements" made to such persons, on the other (R. 527). Such a procedure violated Section 3500. *Palermo v. United States*, 360 U. S. 343, 354; Pet. 30-32.

5. The Instructions on "Membership" and "Affiliation" (Opp., pp. 19-21)

a) The opposition contends that the 11 criteria of membership from Section 5 of the Communist Control Act of 1954 which the trial court listed in the charge to the jury "were plainly relevant considerations" for the jury to consider in deciding whether petitioner was a member of the Communist Party on the critical dates (p. 19).

This argument of the government's overlooks the fact that the charge to the jury omitted the two criteria from Section 5 which were most "plainly relevant". Of the 13 specific criteria set forth in Section 5, the two which were omitted are the first two—whether the accused has been listed to his knowledge as a member by the organization and whether he has paid dues or made any other financial contribution to the organization. It is apparent that the trial judge omitted these criteria because there was no evidence in the case that petitioner has been listed by the Communist Party as a member or that he had paid dues or made some other financial contribution to it. But, the omission of the two criteria from the charge deprived petitioner of his right to have the criteria applied by the jury to his benefit.

Such a one-way application of Section 5 is obviously untenable. It is a denial of trial by jury on the evidence (or lack of it) and a denial of due process. It restricts the jury to consideration only of evidence of guilt and takes away from the jury the opportunity to weigh evidence of innocence, or rather, in this case, the absence of evidence of guilt.

The first two criteria in Section 5 are those most "plainly relevant" to the question of membership. The failure of the trial judge to include them in his instruction was highly prejudicial.

b) Among the questions with respect to which the Court has granted certiorari in *Communist Party* v. *Subversive Activities Control Board*, 361 U. S. 951, now set for argument on October 10, 1960, is the question of the constitutionality of Section 5 (Petition of the Communist Party, p. 4). Inasmuch as the question is already before the Court, certiorari should be granted on the same issue in the instant case.

6. The Demand for Production or Inspection of the Grand Jury Testimony (Opp., pp. 21-24)

(a) The opposition (pp. 21-24) neglects to comment on the merits of the argument in the petition (pp. 29-30) that the question expressly reserved in *Pittsburgh Plate Glass*, 360 U. S. 395, 401, *i.e.*, whether a trial judge, upon request, is "absolutely required" to examine the grand jury testimony of prosecution witnesses for inconsistencies or contradictions with their trial testimony, should be answered in the affirmative. Since this case, unlike *Pittsburgh Plate Glass*, does present the issue, this Court should decide it.

The opposition does dispute the assertion in the petition (p. 29) that the Second Circuit has adopted the rule that inspection by the trial judge is mandatory. But it is impossible to read the pre-*Jencks* opinions in *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, cert. denied *sub. nom, Rosenblum* v. *United States*, 352 U. S. 969, and *United States* v. *Alper*, 156 F. 2d 222, and the post-*Jencks* opinions in *United States* v. *Spangelet*, 258 F. 2d 338, *United States* v. *Zborowski*, 271 F. 2d 661, and *United States* v. *McKeever & Morrison*, 271 F. 2d 669, without concluding that this is now the settled rule in the Second Circuit.

There is no case in the Second Circuit that sustains the refusal of a trial judge to inspect grand jury testimony of a prosecution witness while, on the other hand, the Court recently reversed a conviction because of such a refusal. *United States* v. *Zborowski*, *supra*. Furthermore, that Court has urged prosecutors to make grand jury testimony available directly to the defense, *United States* v. *Spangelet*, *supra*, at 342, and has in fact pointed out that it is the duty of a prosecutor to call inconsistencies or contradictions to the attention of the trial judge, *ibid.*, or to the defense. *United States* v. *Zborowski*, *supra*, at 667-668; *United States* v. *McKeever & Morrison*, *supra*, at 672, n. 2.

(b) In any event, if the trial judge is to exercise discretion, how is it possible to do so where, as here, he rules that the defense must first show a contradiction between the trial and the grand jury testimony (which *Pittsburgh Plate Glass* declares is not required) and then forbids the defense from interrogating the witnesses as to the substance of their grand jury testimony? (Pet., pp. 26-27). Even so, the defense was able to show "a particularized need" justifying direct production (Pet., pp. 27-28), but if this is not so and if the trial court has discretion to make his own inspection, the discretion was clearly abused in this case.

(c) In answer to petitioner's argument that one of the reasons why the grand jury testimony of the witnesses should have been produced to the defense or inspected by the trial judge was that there were variations between the trial testimony of the witnesses and the pre-trial statements or testimony, the government disputes "the suggestion that the variations were significant, that they were material, or that they were of a kind other than that which one would normally expect in the case of a witness seeking to recall details" (Opp., pp. 21-22).

The government's description of the variations in the testimony of the witnesses is glaringly inappropriate. In Gardner's case, for example, his testimony on direct consisted only of two conversations with petitioner, but his statements to the F.B.I. about petitioner made no reference whatever to either conversation and he acknowledged on cross-examination that he had never told the F.B.I. about either of the episodes (Pet., p. 28; R. 864-66). Especially in view of the serious doubt cast on Gardner's credibility otherwise,[4] it would seem that this was clearly a case requiring an examination of his grand jury testimony by the defense or by the court, to determine whether

[4] *Travis* v. *United States*, Nos. 75 and 872, Oct. Term, 1959, involve two motions filed by petitioner for a new trial based on newly discovered evidence about Gardner.

Gardner had given any testimony at all to the grand jury about the two conversations.

Since the issue bore on *all* of Gardner's testimony incriminating petitioner, how can it now be argued that it was insignificant or immaterial? In fact, this would seem to be a classic case of "particularized need" justifying direct production to the defense. It was even more certainly a case requiring, at least, inspection by the trial judge. Yet production or inspection were both denied, even though the defense demand was explicitly restricted to the two episodes (R. 864-67) while, on the other hand, the only alternative avenue open to the defense of developing the matter for the jury was closed off by the ruling of the court that Gardner could not be cross-examined about the substance of his grand jury testimony against petitioner (R. 704).

(d) The government also claims that the trial court did not bar the defense from interrogating the witnesses about their grand jury testimony, but that in the instances cited by petitioner, "objections were sustained because the trial court concluded that the questions were improper in form, scope or purpose" (Opp., p. 23).

What the government says is simply not so. In the case of each of the three witnesses, petitioner sought to inquire into the substance of their grand jury testimony and in each case, on objection by the government, the inquiry was barred (*Eckert*: R. 540. *Gardner*: R. 698-701, 704. *Mason*: R. 873-74). If there is any doubt about the grounds of objection and the position of the trial judge, we direct attention particularly to the ruling sustaining the objection, on the ground of relevance, to the question to Gardner whether, when he appeared before the grand jury, he gave "any testimony about Travis" (R. 704); to the ruling, sustaining objections to similar questions to Mason (R. 873-74); and to the direction of the court, during the course of Mason's cross-examination, when the prosecutor again objected on the ground of relevance, that de-

fense counsel could ask the witness "if he testified before the grand jury without reference to the subject matter" (R. 874).

However, the government declares, there "is no need to debate the correctness" of these rulings because a "complete answer" to petitioner's claim that the trial court did not permit him to ask the witnesses how they had testified before the grand juries is that at numerous other points in the record where petitioner was allowed to ask the witnesses whether they had testified before grand juries about him, petitioner did not go further and ask the witnesses "whether there was inconsistency as between their trial testimony and their grand jury testimony" (Opp., p. 23).

This is no answer at all, let alone a "complete answer", because, at none of the points in the record cited by the government (R. 249, 251, 383, 397, 399, 469, 657, 811, 876, 962, 964-965),[5] was the defense dealing with the matter of inconsistency between the trial testimony of the witnesses and their grand jury testimony. Six of these instances—R. 397, 452, 469, 811, 962, 964-965—have no bearing at all on the issue. These instances occurred in chambers in the course of petitioner's examination of the witnesses to determine whether they had made "statements" to government attorneys under Section 3500. (See *supra*, Point 4, p. 9.) In these instances, the witnesses were asked merely whether they had given testimony to the grand juries about petitioner only as a foundation for asking them about their interviews with government attorneys prior to their grand jury appearances. There was therefore no occasion for asking them about the substance of their grand jury testimony and indeed such inquiry would have been obviously irrelevant to the purpose of the interrogation outside the presence of the jury. In every other instance cited by the

[5] The excerpts are set forth in the Appendix to the opposition, pp. 26-33, except that the Appendix, p. 29, includes an additional excerpt, R. 452, not cited in the body of the opposition, p. 23. Our discussion includes reference to this excerpt as well as to the others.

government, the record will show that the questions were either preliminary to the eventual questions about the substance of the grand jury testimony [6] or had a purpose at the particular time other than impeachment by the showing of inconsistent grand jury testimony. The fact is, as we have shown, that when petitioner finally did seek to elicit from each witness what testimony he had given about petitioner to the grand juries, in each case at a point in the record subsequent to those cited by the government, objections by the prosecution and rulings by the court barred the way.

(c) *Parr* v. *United States*, No. 391, Oct. Term, 1959, pending decision, also presents questions relating to the production of grand jury testimony of a prosecution witness. The instant petition, which presents all phases of the problem, should be considered by the Court at the same time.

CONCLUSION

For the reasons set forth in the petition and in this reply, the petition should be granted.

Respectfully submitted,

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[6] This is subject to one exception which is beside the point. In Mason's case, after the court had already barred interrogation about his grand jury testimony (R. 873-74), he was again asked about his grand jury testimony, but only as a foundation for asking whether he had received fees as a witness (R. 875-76).

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1960.

Maurice E. Travis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January 16, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

In this case petitioner was charged on four counts of an indictment with the making and filing of false non-Communist affidavits[2] required by § 9 (h) of the Taft-

[1] There are two companion cases, No. 3, *Travis* v. *United States*, and No. 71, *Travis* v. *United States*, in which we also granted certiorari and which present phases of the main case. We discuss them near the close of the opinion.

[2] This section, which was repealed by § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, *unless there is on file with the Board an affidavit* executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits." (Italics added.)

Section 35A of the Criminal Code was repealed by § 21 of the Act

Hartley Act, 61 Stat. 136, 146, as amended by Act of Oct. 22, 1951, § 1 (d), 65 Stat. 601, 602. The indictment charged that the affidavits were false writings or documents made and executed in Colorado and filed in Washington, D. C., with the National Labor Relations Board.

Petitioner was convicted and on appeal the judgment of conviction was reversed for a new trial. 247 F. 2d 130. Petitioner was tried a second time and again convicted. This time the judgment was affirmed on appeal, one judge dissenting. 269 F. 2d 928. The case is here on a writ of certiorari. 363 U. S. 801.

Before the first trial, petitioner moved to dismiss the indictment on the ground that venue was improperly laid in Colorado. The District Court denied the motion. Although the Court of Appeals reversed on another ground on petitioner's first appeal, it specifically approved the laying of venue in Colorado (247 F. 2d 130, 133–134) recognizing that its ruling was in conflict with that in *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3d Cir.). It is solely to this issue that we address ourselves.

It is agreed that the affidavits were executed by petitioner as a union officer in Colorado and mailed there to the Board in Washington, D. C., where they were received and filed.[3] The prosecution contends—and it was

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of June 25, 1948, 62 Stat. 683, 862, and is now covered, so far as we are now concerned, by 18 U. S. C. § 1001, which provides:

"Whoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (Italics added.)

[3] Under the regulations in force at the time of filing, petitioner's affidavit was required to be on file with the General Counsel of the National Labor Relations Board in Washington, D. C. 29 CFR § 101.3 (b) (since deleted, see 24 Fed. Reg. 7501 (Sept. 17, 1959)).

held below—that the offense was begun in Colorado and completed in the District of Columbia. In that view venue was properly laid in Colorado by virtue of 18 U. S. C. § 3237 (a) which provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed."

We start with the provision of Art. III, § 2 of the Constitution that criminal trials "shall be held in the State where the said crimes shall have been committed," a safeguard reinforced by the command of the Sixth Amendment that the criminal trial shall be before an impartial jury of "the state and district wherein the crime shall have been committed." We start also with the assumption that Colorado, the residence of petitoner, might offer conveniences and advantages to him which a trial in the District of Columbia might lack. We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give government the choice of "a tribunal favorable" to it. *United States* v. *Johnson*, 323 U. S. 273, 275. We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. "They raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson, supra*, 276.

Where various duties are imposed, some to be performed at a distant place, others at home, the Court has allowed the prosecution to fix the former as the venue of trial. *Johnston* v. *United States*, 351 U. S. 215, 222. The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used. *Armour Packing Co.* v. *United States*, 209 U. S. 56. "The constitutional requirement is as to the

locality of the offense and not the personal presence of the offender." *Id.*, at 76. Where the language of the Act defining venue has been construed to mean that Congress created a continuing offense, it is held, for venue purposes, to have been committed wherever the wrongdoer roamed. *United States* v. *Cores*, 356 U. S. 405. And see *Brown* v. *Elliott*, 225 U. S. 392. The decisions are discrete, each looking to the nature of the crime charged. Thus, while the use of the mails might be thought to allow venue to be laid either at the sending or receiving end, the trial was recently restricted to the district of the sender, in light of the constitutional provisions already mentioned and the phrasing of a particular criminal statute. *United States* v. *Johnson*, *supra*, 277–278. Where Congress is not explicit, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson*, 328 U. S. 699, 703.

Section 9 (h) of the Taft-Hartley Act[4] with which we are concerned did not require union officers to file non-Communist affidavits. If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense. But this statutory design is different. It requires that the Board shall make no investigation nor issue any complaint in the matters described in § 9 (h) "unless there is on file with the Board" a non-Communist affidavit of each union officer. The filings are conditions precedent to a union's use of the Board's procedures. *Leedom* v. *International Union*, 352 U. S. 145, 148. The false statement statute,[5] under which the prosecution is brought, penalizes him who knowingly makes any "false" statement "in any matter within the jurisdiction of any department or agency of the United

[4] See note 2, *supra*.

[5] See 18 U. S. C. § 1001, note 2, *supra*.

States." There would seem to be no offense, unless petitioner completed the filing in the District of Columbia. The statute demanded that the affidavits be on file with the Board before it could extend help to the union; the forms prescribed by the Board required the filing in the District of Columbia; the indictment charged that petitioner filed the affidavits there. The words of the Act—"unless there is on file with the Board"—suggest to us that the filing must be completed before there is a "matter within the jurisdiction" of the Board within the meaning of false statement statute.[6] When § 9 (h) provides the criminal penalty,[7] it makes the penal provisions applicable "to such affidavits," *viz.*, to those "on file with the Board."

The Government admits that the filing is necessary to the "occurrence" of the offense, but, it argues, that the offense has its "beginning" in Colorado, because it was there that "the defendant had irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense." We do not agree with this analysis. Venue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the *locus* of the crime. After mailing, the affidavit might have been lost; petitioner himself might have recalled it.[8] Multiple venue in general requires crimes consisting of "distinct parts" or involving "a continuously moving act." *United States* v. *Lombardo*, 241 U. S. 73, 77. When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place. *Id.*, at 76–78. The theory of that

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[6] See 18 U. S. C. § 1001, note 2, *supra*.

[7] See note 2, *supra*.

[8] 39 CFR § 43.6 (a) provides: "Mail deposited in a post office may be recalled by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind."

case was followed in *United States* v. *Valenti*, *supra*, where Judge Maris stated that no false statement has been made within the jurisdiction of the Board "until the affidavit through its filing has become the basis for action by the Board." *Id.*, at 244.

We think that is the correct view when 18 U. S. C. § 3237 is read in light of the constitutional requirements and the explicit provision of § 9 (h). The *locus* of the offense has been carefully specified; and only the single act of having a false statement at a specified place is penalized. The rationale of *United States* v. *Lombardo*, *supra*, a case involving a failure to file, is therefore equally applicable here. We conclude that venue lay only in the District of Columbia.

Petitioner also brought here two companion cases arising out of the same trial. In No. 3 he asked for a new trial on the ground of newly discovered evidence. In No. 71 he moved a second time for a new trial on the ground of newly discovered evidence. We granted the petitions in these cases as they were protective of petitioner's rights in the main litigation. 363 U. S. 801. But since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside. Accordingly the orders in Nos. 3 and 71 denying new trials have become moot and are vacated in the customary manner. In No. 10 the judgment is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1960.

Maurice E. Travis, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January 16, 1961.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Clark join, dissenting.

Title 18 U. S. C. § 3237 (a) provides in pertinent part:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States *begun* in one district and *completed* in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed." (Emphasis added.)

On my view of the offense with which Travis is charged, I think that under this section the Government was entitled to proceed either in Colorado, where this affidavit was made, or in the District of Columbia, where the affidavit was filed, and therefore dissent from the Court's holding that venue was improperly laid in Colorado.

Section 9 (h) of the Taft-Hartley Act,[1] 61 Stat. 136, provides that the National Labor Relations Board shall

[1] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated

neither make an investigation nor issue any complaint on behalf of a labor union unless there is on file with it a non-Communist affidavit of the kind here in question. 18 U. S. C. § 1001 [2] is specifically made applicable to such affidavits. That section of the criminal code makes it an offense, in any matter within the jurisdiction of any department or agency of the United States, to falsify a material fact, make a false statement, or make or use any false writing or document. The elements of the crime here involved, therefore, are set out in 18 U. S. C. § 1001, and what § 9 (h) does is simply to supply the "jurisdiction of . . . [an] agency of the United States" required by § 1001.

If this crime may properly be viewed as having been begun in the district of Colorado and completed in the district of the District of Columbia, then venue may be laid in either district under 18 U. S. C. § 3237 (a). Whether that is the proper view of this offense is an issue on which the authorities in this Court are at best inconclusive. In *In re Palliser*, 136 U. S. 257, the Court held that where the defendant had mailed in New York to a postmaster in Connecticut a letter which constituted a

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with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [18 U. S. C. § 1001] shall be applicable in respect to such affidavits." 29 U. S. C. § 159 (h), repealed by Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, § 201 (d).

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

prohibited tender of a contract with intent to induce the postmaster to violate his lawful duty, venue could properly be laid in the district of Connecticut. The Court expressly left open the question of whether venue might also have been laid in New York, 136 U. S., at 267–268. To the same effect is *Burton* v. *United States*, 202 U. S. 344. *United States* v. *Lombardo*, 241 U. S. 73, which the Court considers particularly significant, is not controlling, since in that case the offense charged was the *failure* to file with the Commissioner General of Immigration certain information concerning an alien woman whom the defendant was harboring for purposes of prostitution. In such a charge it is difficult to see how the defendant does anything at all except at the place where he fails to file. But cf. *United States* v. *Cores*, 356 U. S. 405. In contrast, the false affidavit in the present case first came into existence in Colorado, having been made and sworn to there.

Nor do the opinions in the lower courts establish anything like a clear line of authority from which it would be unwise now to depart. If anything, I think, they indicate a contrary conclusion to that now reached by the Court. Compare *Henslee* v. *United States*, 262 F. 2d 750; *Miller* v. *United States*, 246 F. 2d 486; *De Rosier* v. *United States*, 218 F. 2d 420; *United States* v. *Downey*, 257 F. 366 and *Bridgeman* v. *United States*, 140 F. 577, *with United States* v. *Valenti*, 207 F. 2d 242.

In these circumstances, the proper course to follow appears to me to be to "determine [the appropriate venue] from the nature of the crime alleged and the location of the act or acts constituting it," *United States* v. *Anderson*, 328 U. S. 699, 703, and that determination should take into account that

> ". . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a

remote place. Provided its language permits, the Act in question should be given that construction which will respect such considerations." *United States* v. *Cores*, 356 U. S. 405, 407.

In this kind of a case, prosecution in the district in which the affidavit was executed, most often I would suppose the place where the union offices are located, is more likely to respect the basic policy of the Sixth Amendment than would a prosecution in the district where the affidavit was filed. The witnesses and relevant circumstances surrounding the contested issues in such cases more probably will be found in the district of the execution of the affidavit than at the place of filing which, as in this instance, will often be for the defendant "a remote place." *United States* v. *Cores*, *supra*—that is the District of Columbia where the headquarters of the National Labor Relations Board are located in the case of officers of international unions, or elsewhere throughout the country where the Board has branch offices in the case of local union officers, 29 CFR § 101.3.

This is not to say that venue *must* be limited to the place of execution of the affidavit, but only that there is no lack of consonance with the underlying policy of the Sixth Amendment in permitting venue to be laid there if the elements of the crime allow. *United States* v. *Anderson*, *supra*. In holding that the crime for which this petitioner was prosecuted does not allow venue to be laid in the district of the making of the affidavit, the Court considers the essence of the crime to be the filing of the affidavit, and until that is accomplished it holds that the crime is not even begun. But since it is 18 U. S. C. § 1001 which defines the offense, § 9 (h) only supplying the requisite jurisdiction of the agency of the United States, and since by § 1001 the offense consists of *falsifying* a material fact, *making* a false statement, or *making* or using any false writing or document, it seems eminently

reasonable to consider that the offense is at least definitively begun at the place where the false affidavit is actually made, sworn and subscribed. Cf. the *Henslee*, *Miller*, *De Rosier*, *Downey* and *Bridgeman* cases, *supra*.

It is of course true that the offense is not completed until the affidavit is filed with the Board, but I do not think it adds anything to say, as the Court does, that until such time as the affidavit is filed with the Board there is no matter "within the jurisdiction of any department or agency of the United States." The fact that the filing completes the offense by giving the Board jurisdiction over the matter does not, in my view, detract from the conclusion that the offense was begun when and where the affidavit was executed. Indeed this would seem to be the very type of situation contemplated by 18 U. S. C. § 3237 (a).

Since I consider it would be inappropriate for me, in dissent, to discuss issues which the Court does not reach, I refrain from considering the other grounds for reversal urged by the petitioner.